94-123

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BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

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FCC
Office of the Secretary

In the Matter of	)	
	)	
Amendment of Section 73.658 (k)	)	
of the Commission's Rules to	)	RM No. _____
Delete the "Off-Network" Program	)	Docket No. _____
Restriction	)	

To: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

The Program Producers and Distributors Committee ("PPDC"), hereby submits the following Opposition to the Application for Review filed by Channel 41, Inc. in the above-captioned matter. The Application seeks review of a Commission staff denial of Channel 41's Petition for Rulemaking to repeal the "off-network" portion of the Prime Time Access Rule ("PTAR" or "Rule").1/ PPDC believes, for reasons more fully stated below, that the staff's action was correct and the Application should be denied.

Statement of Interest

PPDC is composed of producers and distributors of first-run syndicated television programming.2/ The ability of PPDC members to produce and distribute programming which is not subject to network control or influence is a direct

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1/PTAR prohibits network affiliated television stations in the top 50 markets from running more than 3 hours of either network or "off-network" programming during the 4 hours of prime time, Monday through Saturday. 47 C.F.R. §73.658(k).

2/A list of PPDC members is contained in Appendix A.

consequence of the off-network provision of PTAR, which Channel 41 is seeking to eliminate. To date, PTAR, and particularly its off-network provision, have succeeded in creating a vigorous marketplace for first-run programming which did not exist prior to the enactment of PTAR and which would not exist in its absence. This programming marketplace would be severely disrupted (to the detriment of the public interest in receiving programming from diverse sources) should the Commission initiate a rulemaking proceeding at this time on any aspect of PTAR. Producers and distributors would be extremely reluctant to commit to new programs if there was any doubt as to whether top 50 market network affiliate stations would still be purchasing their product in the foreseeable future.

As Channel 41 has not presented any basis for a rulemaking proceeding at this time, and because the staff's action was an appropriate exercise of its expertise within its delegated authority and discretion, as well as being precisely in accord with controlling Commission and judicial precedent, the Commission should deny the Application for Review and affirm the dismissal of Channel 41's Petition.

A. The Intent of PTAR is to Promote Independently Produced Programming.

The clear and overriding intent of PTAR is to develop a marketplace for independently produced television programming outside the programming "funnel" of the three major television networks. Prior to PTAR, there was no

first-run syndicated programming being produced for prime time, for the simple reason that no viable market existed. As the Commission recognized at the time of PTAR's adoption, "the three national television networks for all practical purposes control the entire network television program production process from idea through exhibition," a situation which the Commission deemed "unhealthy" and which the public interest required be alleviated. Network Television Broadcasting, 23 FCC 2d 318, 389 (1970); recon. denied, 25 FCC 2d 318 (1970), aff'd sub nom., Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2nd Cir. 1971). The Court of Appeals agreed, concluding that "[t]he evidence in the record leads inescapably to the conclusion that access to network affiliated stations during prime time is virtually impossible for independent producers of syndicated programs." 442 F.2d at 483.

To cure this deficiency, the Commission fashioned a regulatory solution that was "directed...to the heart of the problem" of an arbitrarily foreclosed market for syndicated programs. 442 F.2d at 483. To open up access, network affiliates in the top 50 markets were limited to taking no more than three hours of network prime time programming, thus creating a window of time that local television stations might use for non-network produced programming. The top 50 markets were singled out as they are "the essential base for independent producers to market programs outside the network process." 23 FCC 2d at 394. The Commission's objective was

> to provide opportunity--now lacking in television--for the competitive development of alternate sources of television programs so that television licensees can exercise something more than a nominal choice in selecting the programs which they present to the television audiences in their communities.

Id. at 397. PTAR is thus deeply rooted in the bedrock First Amendment principle that "'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public....'" Mt. Mansfield, 442 F.2d at 477 [quoting Associated Press v. U.S., 326 U.S. 1 (1945)].

The Commission realized that merely limiting the amount of network programming would not by itself lead to the development of independent programs because stations could simply substitute "off-network" programming in the newly available time slots. This would do nothing to enhance the diversity of programming sources since "the production, and hence the form and content" of such "off-network" programming was also controlled by the networks. 23 FCC 2d at 389. Therefore, the Commission mandated that "[o]ff-network programs may not be inserted in place of the excluded network programing," Id. at 395. As the Court of Appeals recognized, "to permit this [use of reruns and film during the freed time period] would destroy the essential purpose of the rule to open the market to first run syndicated programs." Mt. Mansfield, 442 F.2d at 484 [quoting Network Television Broadcasting, 23 FCC 2d at 395].

B. The Undisputed Success of PTAR Would Be Threatened By A Rulemaking Proceeding at This Time.

1. The Impact of PTAR

As intended, PTAR is succeeding in creating a competitive marketplace for independently produced programs that are not subject to network control or influence. Network affiliates and independent stations may now choose from numerous first-run syndicated programs during the access period created by PTAR. There is now a diverse menu of independently produced programs that are intended to serve a wide range of public needs and interests, running the gamut from entertainment to public affairs and informational features. Notwithstanding these advances, however, the first-run syndication market pales in comparison to the programming controlled by the three major television networks. The networks retain their overwhelming dominance as they continue to control 75% of prime time programming. The first-run syndication market has been created only by painful and extensive creative work over many years and in the face of continued network dominance and control. It is a luxuriant, but fragile flower.

2. A Rulemaking Proceeding at this Time Would Have a Chilling Effect on the Syndicated Programming Market.

The existence of PTAR assures producers and distributors that for the foreseeable future a modest portion of prime time in the top 50 markets will be available for at least a few first-run syndicated programs. The certainty of this first-run syndicated programming market is a necessary

condition for producers and distributors to take the considerable risks of developing untried syndicated programs. However, because of the importance of the continued existence of that market, any uncertainty regarding the future of PTAR caused by a rulemaking proceeding would have a chilling and potentially devastating effect on the programming marketplace.

There is at least an eighteen month period between the creation of a television program concept and the production, distribution and actual broadcast of the program. As a result, program distributors negotiate contracts with local television stations far in advance of the air date. For example, stations are now obtaining rights for the fall 1989 television season.

The production and distribution of first-run syndicated programming is an extremely risky venture. A typical program requires hundreds of thousands of dollars in initial investment. Because only a handful of the programs developed can become commercially successful, the potential losses are enormous. As it takes years to produce a program, and frequently several more before the program develops an audience, there is a considerable delay before the profits of even the most successful programs can be realized. What makes the investment worthwhile is the knowledge that there is a market for first-run programming, and that at least a few programs can become very successful.

Without reasonable assurance of an available market over time, the industry could be crippled.

The entire history of PTAR demonstrates the need for assurance of reasonable market stability. The first five years of the PTAR's history were dominated by lengthy Commission proceedings, numerous amendments, petitions for reconsideration, judicial appeals and remands back to the Commission. This had a profoundly chilling impact on the effectiveness of the rule, delaying the development of first-run syndicated programming for several years. In 1975, the apparent lack of progress led to calls to repeal PTAR because of the rule's alleged ineffectiveness. The Commission rejected those arguments, in part, because, as the Court noted in its affirmance, "the very uncertainty of the future of the Prime Time Access Rule was a factor that inhibited the growth of independent producers of quality programs...." NAITPD v. FCC, 516 F.2d 526, 534 (D.C. Cir. 1975) [citing Prime Time Access Rule, 50 FCC 2d 829, 837 (1975)].3/

The same type of uncertainty (with its resulting freeze on new program investment) that plagued PTAR in its early history would reoccur should the Commission be induced to commence a rulemaking proceeding on the off-network provision. Indeed, the last time that the FCC was asked to repeal the off-network rule, in 1981, it was reported that

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3/The Commission had also explained that these uncertainties had "undoubtedly had a discouraging effect on investment in the development of programs...." 50 FCC 2d at 837.

because of fears that "the FCC will scrap the access rule, none of the major syndication producers is seriously planning any new strips for the 1982-1983 access season." Variety, August 19, 1981. In order to avoid a repetition of this possibility, the Commission should not conduct any further proceedings regarding PTAR at this time.

C. Denial of Channel 41's Petition was Appropriate and Within the Staff's Discretion.

The staff denial of Channel 41's Petition for Rulemaking was not only well within its delegated authority and discretion, but it was also squarely in accord with past Commission recognition of the needs of the programing marketplace and the importance of the off-network provision to the overall rule.

The Commission staff, and the Commission as a whole, necessarily have broad discretion under the Communications Act and FCC regulations. Congress designated the Commission as the expert agency on matters related to broadcasting, and as a result, the courts have repeatedly deferred to the Commission's expertise. In particular, the courts have allowed for broad discretion in the disposition of petitions for rulemaking.[4/]

This discretion was properly exercised by the Commission staff in dismissing the Channel 41 Petition. The

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4/See, e.g., ACT v. FCC, 564 F.2d 458, 479 (D.C. Cir. 1977); WWHT, Inc. v. FCC, 656 F.2d 807 (D.C. Cir. 1981); ITT World Communications v. FCC, 699 F.2d 1219 (D.C. Cir. 1983), rev'd on other grounds, 466 U.S. 463 (1984).

off-network provision that Channel 41 seeks to eliminate has been recognized as a critical element of PTAR.[5] The mere initiation of a rulemaking proceeding at this time would have a chilling and potentially devastating effect on first-run program production and distribution. As the staff indicated in its denial, the relief sought in the Petition "would, in effect, deprive the rule of most of its effect." The staff's action was in full accord with the Commission's long-standing refusal to tamper with PTAR through either rulemaking or waiver requests,[6] and with its rules allowing for dismissal of "petitions which are moot, premature, repetitive, frivolous, or which plainly do not warrant consideration by the Commission."[7]

The Channel 41 Petition simply does not present any arguments that could counterbalance the strong presumption against initiating a potentially damaging rulemaking proceeding at this time. Nothing in the Petition indicates that PTAR is not working. Indeed, the Petition actually suggests the opposite by stressing the achievements of PTAR and arguing that it is therefore no longer necessary. However, it is well within the Commission's discretion to decline to answer constant calls to revisit a well-

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5/See p.4, supra.

6/Rhodes Productions, Inc., 58 RR 2d 126 (1985); Station WUHQ-TV, Inc. (Channel 41), 48 RR 2d 1239 (1981); Station WATR-TV, 48 RR 2d 1221 (1981); WBRE-TV, 70 FCC 2d 2021 (1979); Top 50 Markets, 67 FCC 2d 1532, 1537 (1978).

7/47 C.F.R. §1.401(e).

established rule simply because of claims that the rule is succeeding, especially, as here, where conducting a rulemaking proceeding could destroy the undisputed benefits that the rule has fostered.

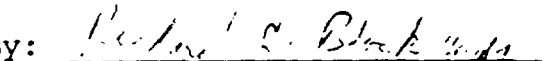
Finally, Channel 41 argues at length that the off-network rule is unconstitutional. The constitutionality of PTAR, including the off-network rule, was expressly upheld in Mt. Mansfield and NAITPD v. FCC. Nothing has happened in the interim to suggest that the constitutional law of these cases is no longer controlling. There is neither warrant nor need for the Commission to revisit the constitutional question.

Conclusion

For the reasons stated above, the Commission should deny the Application for Review of Channel 41, Inc. Taking any step toward the initiation of a rulemaking proceeding at this time would serve no public interest purpose and would be severely disruptive to the first-run syndicated programming marketplace.

Respectfully submitted,

PROGRAM PRODUCERS AND
DISTRIBUTORS COMMITTEE

By: 

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July 21, 1987

APPENDIX A

MEMBERS OF THE
PROGRAM PRODUCERS AND DISTRIBUTORS COMMITTEE

ACCESS SYNDICATION
ALL AMERICAN TELEVISION
ART GREENFIELD COMPANY
BLAIR ENTERTAINMENT
BUENA VISTA TELEVISION
COCA-COLA TELECOMMUNICATIONS, INC.
COE FILM ASSOCIATES INC.
COLBERT TELEVISION SALES
D.L. TAFFNER/LIMITED
GAYLORD PRODUCTIONS
GENESIS ENTERTAINMENT
GILSON INTERNATIONAL
GROUP W PRODUCTIONS
JM ENTERTAINMENT, INC.
KING WORLD INC.
LBS COMMUNICATIONS, INC.
MARK GOODSON PRODUCTIONS
MERV GRIFFIN ENTERPRISES
MG/PERIN (APD)
MULTIMEDIA ENTERTAINMENT
ORBIS COMMUNICATIONS, INC.
ORION HOME ENTERTAINMENT
PEREGRINE ENTERTAINMENT
RADIO CITY MUSIC HALL
SANDY FRANK FILM AND SYNDICATION, INC.
THE SILVERBACH-LAZARUS GROUP
SYNDICAST SERVICES, INC.
TRIBUNE ENTERTAINMENT COMPANY
VICTORY TELEVISION, INC.

CERTIFICATE OF SERVICE

I, Robert M. Gurss, hereby certify that the foregoing "Opposition to Application for Review" was served this 21st day of 1987, by hand, to the following individual at the address listed below:

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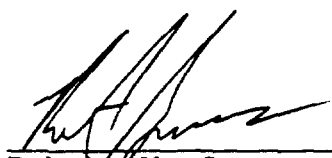

Robert M. Gurss